Supreme Court, U.S.
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No. 99-492

In The

Supreme Court of the United States

JEANNIE I. JOHNSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May a criminal defendant be tried for a crime for which she has not been indicted in violation of the Fifth Amendment to the United States Constitution?

PARTIES TO THE PROCEEDINGS

Petitioner Jeannie I. Johnson is an individual who was contracted to the Los Angeles County Metropolitan Transit Authority as its Acting Controller.

Respondent is the United States of America.

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OPINIONS BELOW

The District Court's minute order denying Ms. Johnson's pre-trial motion is reproduced as Appendix A. The Court of Appeals' unreported Memorandum affirming Ms. Johnson's conviction is reproduced as Appendix B.

JURISDICTION

The Court of Appeals judgment was entered on June 23, 1999. This petition is being filed within 90 days of that date and is thus timely. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION IN ISSUE

The Fifth Amendment to the United States Constitution states in relevant part:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."

STATEMENT OF THE CASE

Jeannie Johnson, a Certified Public Accountant within the State of California, was contracted to perform the functions of the Acting Controller for the Los Angeles County Metropolitan Transit Authority ("MTA"), the agency responsible for constructing the Los Angeles area subway system. Ms. Johnson performed these duties as an independent contractor from September 5, 1995

through May 1, 1996 and had the formal title of Acting Controller from January 1, 1996 through May 1, 1996.[1]

During pre-indictment negotiations, the Government took the position that payments to Ms. Johnson, made pursuant to written contract, constituted the crime of soliciting and accepting kickbacks in violation of 18 U.S.C. § 666. In accordance with that position, the Government made a formal written plea offer to Ms. Johnson requiring a guilty plea to one count of 18 U.S.C. § 666, a *federal kickback statute*. The offer was rejected by Ms. Johnson.

As a matter of law, Ms. Johnson could not be convicted of violation of 18 U.S.C. § 666 because she was never "a servant or employee, and a partner, director,

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[1] During this time period, pursuant to written contracts, Ms. Johnson received payments from other accountants who performed work for the MTA and who were contracted to Ms. Johnson's firm. The payments were made by check and the parties exchanged 1099s reflecting such payments. At trial, Ms. Johnson called to testify an expert witness in the area of C.P.A. ethics and accounting standards, who was the chairman of the California State Board of Accounting Administrative Committee, which is the committee that disciplines accountants in the State of California. This expert testified that "there was no violation of any provisions of the accountancy [act] or any regulations governing the practice of accountancy with respect to the monies that were being paid by the individual CPAs to [Ms. Johnson]" and that there was no ethical violation on her part at all. The Government failed to call an expert witness to refute such testimony.

officer, manager, and representative," as those terms are defined within Section 666, of a Government entity.[2]

After choosing not to indict Ms. Johnson for one of the federal kickback statutes, on January 8, 1997, the Government indicted her for mail fraud, defining her offense and repeatedly referencing the payments in issue as "kickbacks."

The only purpose of the "kickback" term, rather than employing a neutral term such as "payment" or "unauthorized payment," was for its inflammatory effect, especially in light of the significant negative publicity in Los Angeles County relating to the construction of the subway and the problem of kickbacks.

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[2] "Agency" is one element of 18 U.S.C. § 666 (i.e., the federal anti-kickback statute). It states in relevant part as follows:

> "Theft or bribery concerning programs receiving Federal funds: (a) Whoever, if the circumstances described in subsection (b) of this section exists –
>
> (1) being an **agent** of an organization, or of a State, local, or Indian tribal government, or any agency thereof –
>
> (A) embezzles, steals, . . .
>
> (B) corruptly solicits . . .
>
> (d) As used in this section –
>
> (1) the term **"agent"** means a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative;" [Emphasis added.]

Pre-trial, Ms. Johnson moved to strike the word "kickbacks" from the indictment based, in part, on the Fifth Amendment prohibition against being tried for a crime for which one has not been indicted.[3]

In its Opposition Memorandum, the Government conceded that its use of the term "kickbacks" was intentional and that these "kickbacks" were to be the focal issue at trial. It stated:

> "In the present case the allegation that defendant received a "kickback" is both material and relevant in that it most accurately captures and conveys to the jury the evidence the government will introduce at trial. To the extent that defendant contends that the payments she received were voluntarily tendered, rather than extorted, that will be an issue to be resolved at trial. However, *the term is central to the government's theory of the case* and should not be stricken." [Emphasis added.]

Not recognizing the Constitutional prohibition against being tried for a crime for which one has not been indicted, the District Court denied Ms. Johnson's motion.

Pre-trial, Ms. Johnson filed a motion to preclude use of "kickbacks" in opening statements, in charts to be used during opening statements and during the remainder of the trial. The District Court also denied that motion.

After the District Court read to the jury the "kickback" indictment, the Government, recognizing the

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[3] Petitioner had not been indicted for either violation of 18 U.S.C. § 666 nor 41 U.S.C. §§ 51, et seq. (i.e., the Anti-kickback Statute of 1986).

problem, immediately requested a curative instruction for the reversible error which had just been injected at its request. No such instruction was ever given.

As intended by the Government, and over the constant objections of Ms. Johnson, the trial was solely focused on the issue of "kickbacks." Throughout the trial, from the opening statements, continuing through the questioning of witnesses, and finally through closing arguments, the Government repeatedly referred to the payments received as "kickbacks." It was the only theme of the case.[4] Repeated use of the term "kickback" was

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[4] Several witnesses were questioned about the "kickbacks." For example, the Government asked the following of Petitioner's expert witness:

> GOVERNMENT'S COUNSEL: And you understand that the indictment in this case alleges that in fact what Ms. Johnson received were kickbacks; correct?
>
> WITNESS: That's the allegation, yes.
>
> GOVERNMENT'S COUNSEL: And we'll see what the jury decides regarding about whether it's correct, but that's the –
>
> DEFENSE COUNSEL: Objection. Move to strike counsel's testimony.
>
> THE DISTRICT COURT: Yes. Counsel is not to make comments.
>
> GOVERNMENT'S COUNSEL: Thank you, your Honor. So you know that at least there is an allegation regarding a fact that these kickbacks were made, and that an indictment was returned by a Federal Grand Jury; is that correct?
>
> DEFENSE COUNSEL: Objection. Vouching. I request an admonition, your Honor.

erroneously permitted by the District Court because it contended that the Government actually had to prove that the payments received were "kickbacks."[5, 6]

The charge of soliciting kickbacks was the linchpin of the Government's closing arguments to the jury. The Government argued the following:

> "She [i.e., Ms. Johnson] then sits down with them and talks about this *kickback* rate that we talked about. And she devises the contract. There's no question about that, and she admitted it. This was her contract, her scheme. And she asked them to all enter into these agreements."
>
> . . .
>
> "That's not a raise. That's simply reducing the amount of the *kickback* and making peopie feel like they somehow got a raise."
>
> . . .
>
> She doesn't provide copies of these contracts, these ones requiring the *kickbacks*, to

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THE DISTRICT COURT: I'm going to sustain that objection and ask that the government counsel not proceed with that line, the latter part of it."

[5] The District Court stated:

THE DISTRICT COURT: But isn't the jury going to have to decide whether the money that she took was a kickback or not? You charge that it was a kickback.

GOVERNMENT'S COUNSEL: I think that they will.

THE DISTRICT COURT: That's one of the questions they have to answer.

[6] No definition for "kickback" was ever given to the jury.

> anybody. Period. Anybody at the MTA, bd, or ThirdWave, at any time." [Emphasis added.]

Recognizing the Government's problems, the District Court described this as a "close case," "a very close case" and "a very close question as to the credibility of the witnesses." Despite the closeness of the case, the jury convicted Ms. Johnson.

SUMMARY OF ARGUMENT

Since the ratification of the Fifth Amendment to the United States Constitution in 1791, there have been no published cases in which, as here, the Government obtained an indictment for one crime, defined certain actions in the indictment as a different crime, and then tried an individual for that other, unindicted crime.

Trying a person for a crime for which she has not been indicted has never occurred before this case, because such proceedings would violate the Fifth Amendment to the United States Constitution, which explicitly states that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . "[7]

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[7] "Infamous crimes" have been defined as those crimes "punishable by imprisonment in [a] penitentiary," *Mackin v. United States*, 117 U.S. 348, 354 (1886), or by imprisonment for a term of years at hard labor, *Ex parte Wilson*, 114 U.S. 417, 429 (1885). The sentence that a court may impose, rather than the actual sentence, is determinative as to whether a Grand Jury indictment is required. *See United States v. Moreland*, 258 U.S. 433, 441 (1922). Because persons convicted of crimes punishable

The Court of Appeals cited no case regarding this issue, and did not address the Constitutional issue in its memorandum. The District Court cited a single case, *United States v. Ramirez*, 710 F.2d 535 (9th Cir. 1983).[8] Neither *Ramirez*, nor any other published case, addresses the issue presented to this Court, in which the Government, not being able to obtain a conviction for a crime (i.e., soliciting or accepting kickbacks), indicts the defendant for another crime, and then makes the crime that could not be charged the only focus of the trial.

The Government did not dispute that the solicitation and acceptance of kickbacks is a separate federal crime. *See* 18 U.S.C. § 666 and 41 U.S.C. §§ 51 to 58.[9]

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for more than one year may be confined to a penitentiary pursuant to 18 U.S.C. § 4083, such crimes are considered "infamous." *See United States v. Coachman*, 752 F.2d 685, 689 n.24 (D.C. Cir. 1985).

[8] In *Ramirez*, the defendant moved to strike the following portions from the indictment: the signatorial phrase "a true bill," the names and signatures of the Foreperson and the United States Attorney and the introductory phrase "the Grand Jury charges."

[9] In fact, the latter statute specifically uses "kickback" multiple times and defines a "kickback" as follows:

> "The term 'kickback' means any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to any prime contractor, prime contractor employee, subcontractor, or subcontractor employee for the purpose of improperly obtaining or rewarding favorable treatment in connection with a prime contract or in connection with a subcontract relating to a prime contract."

Rather, the Government argues that the District Court did not abuse its discretion when it permitted inflammatory language to remain in the indictment.

However, such contention entirely sidesteps the Constitutional issue that the indictment and trial violated Ms. Johnson's Constitutional rights and the "kickback" allegation should have been excised from the indictment and precluded entirely at trial. Also contrary to the Government's position below, the proper standard of review should have been *de novo* rather than abuse of discretion because of the Constitutional claim. *See United States v. Elgersma*, 979 F.2d 750 (9th Cir. 1992).

In support of its ruling, the District Court reasoned that use of the word "kickbacks" in the indictment was proper because the word is in the dictionary. However, whether the word is included in a dictionary is irrelevant as to whether its use violated a Constitutional provision. In fact, every crime listed in the United States Code is likely to appear in a dictionary because it is a word existing in the English language. Contrary to the District Court's contention, what is significant is not that a dictionary lists an entry for "kickbacks" but rather that the United States Code defines "kickback" as a crime. *See* 41 U.S.C. §§ 51, et seq.

Ignoring the Constitutional issue raised by Ms. Johnson, the Government argued the proposition that when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants. The Supreme Court has referred to this as "prosecutorial choice." *United States v. Batchelder*, 442 U.S. 114, 123-24, 60 L.Ed.2d 755, 99 S.Ct. 2198 (1979). This "choice" given to

prosecutors, however, does not permit them to define the purported offending conduct as the other (uncharged) crime.[10]

The case of *United States v. Evans*, 148 F.3d 477 (5th Cir. 1998), is illustrative as to how the charges should have been set forth in the indictment and how the evidence should have been adduced at trial so as not to violate the express language of the Fifth Amendment.

Evans was a Texas parole officer, who, during the course of her duties, accepted cash and favors from a parolee whom she supervised in exchange for ignoring and then actually facilitating his illegal activities. Evans was eventually indicted for mail fraud. However, in the indictment, rather than charging the receipt of payments as "kickbacks" (as was done here) the indictment described the money received in a neutral fashion, i.e., "defendant, would agree to and did accept payments in cash [from parolee]." *Evans*, 148 F.3d at 481.

Other than the inflammatory purpose of inciting the jury in this case, use of the phrase "kickbacks" in the indictment and during trial, served no purpose and should have been completely omitted, as was done in *Evans*.

The smear value, in this "close case," by portraying Ms. Johnson as a high-ranking official at the MTA, who was charged in one of those "kickback" cases did not, and

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[10] Petitioner never challenged the Government's authority to charge her with either mail fraud or "kickbacks" but has steadfastly challenged the propriety of the trial, which was based on an unindicted (and in fact, as described herein, an unindictable) charge.

could not, give justification to its use because of the Constitutional prohibition.[11] In fact, given alternatives to use of the word "kickbacks," such as "payments" or "unauthorized payments," there is little doubt that the Government's use of the inflammatory word "kickback" was solely for an improper (and prejudicial) purpose in violation of the United States Constitution. Ironically, there was no way for Ms. Johnson to defend against the "kickback" allegation because, while the trial focused on the unindicted "kickback" charge, the jury instructions, as of necessity, were about the indicted charge of mail fraud.

Apart from violation of Ms. Johnson's Fifth Amendment right raised by the present Petition, Courts have consistently condemned gratuitous name calling. For example, in *United States v. Cannon*, 88 F.3d 1495 (8th Cir. 1996), the Assistant United States Attorney in North Dakota, a State whose African-American population amounted to 0.6%, made reference to the African-American defendants as "bad people" and argued how "lucky" the North Dakotans were not to come into frequent contact with the "bad people" from elsewhere in the country. Based on this improper name calling, the Court of Appeals reversed the conviction. *See also United States v. Singer*, 660 F.2d 1295, 1304 (8th Cir. 1981) (finding prosecutor's reference to "crooks" improper), *cert. denied*, 454 U.S. 1156, 102 S.Ct. 1030, 71 L.Ed.2d 314 (1982); *Hall v. United States*, 419 F.2d 582, 587-88 (5th Cir. 1969) (finding

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[11] As one prospective juror stated, based on his erroneous belief that he had read about this MTA kickback case: "It seems that the papers have given a lot of coverage to this, and I find it hard to believe that the people haven't read it."

prosecutor's reference to "hoodlums" improper); *United States v. Blakely*, 14 F.3d 1557 (11th Cir. 1994) (finding prosecutor's reference to defendant as a "professional criminal" improper). Given the significant negative publicity within the Central District of California about criminal problems at the MTA, and the effect that the publicity had on the jury, use of the "kickback" charge was gratuitous and resulted in Ms. Johnson being tried on the more highly-charged crime of soliciting and accepting kickbacks rather than for mail fraud.

Both the Court of Appeals and the District Court utterly failed to address the Constitutional violation which occurred in this case. Ms. Johnson's Constitutional claim was simply ignored. The Government's claim that use of its inflammatory term was "central" to its theory of the case does not justify violating Ms. Johnson's Fifth Amendment rights. As such, Johnson's conviction must be reversed.

PROCEDURAL HISTORY

On January 8, 1997, Ms. Johnson was charged in an indictment alleging mail fraud. Trial commenced on November 4, 1997 and on December 1, 1997 the jury returned verdicts of guilty. On September 14, 1998, Ms. Johnson was sentenced to a term of imprisonment of twenty-four months, to be followed by three years of supervised release, ordered restitution in the amount of $84,412.90 and a special assessment of $1,450.00. Also on September 14, 1998, the district court denied Ms. Johnson's motion for bail pending appeal and ordered her to

surrender to a designated institution by November 30, 1998.

On November 18, 1998, the Court of Appeals denied Ms. Johnson's Motion for Bail Pending Appeal. On June 23, 1999, the Court of Appeals affirmed Ms. Johnson's conviction.

REASONS FOR GRANTING THE WRIT

The Petition for Writ of Certiorari should be granted because it is a case of first impression and has far reaching implications. Neither the Court of Appeals nor the District Court even discussed the Constitutional issue raised herein. Without reversal, the Government will be free to try individuals for crimes upon which they have not been indicted, and even crimes for which all elements do not exist, by merely charging some other crime and then describing the purported improper conduct as some unindicted crime.

If permitted, such conduct by the Government will make meaningless the referenced portion of the Fifth Amendment.

CONCLUSION

Ms. Johnson's conviction must be reversed because it was based on District Court proceedings which violated her rights under the Fifth Amendment to the United States Constitution.

Dated: September 17, 1999.

Respectfully submitted,

STANLEY L. FRIEDMAN
Counsel of Record

Attorney for Petitioner
Jeannie I. Johnson

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 98-50620
Plaintiff-Appellee,	)	D.C. No. CR-97-17-KMW
v.	)	
JEANNIE I. JOHNSON,	)	**MEMORANDUM***
Defendant-Appellant.	)	(Filed Jun 23, 1999)

Appeal from the United States District Court
for the Central District of California
Kim M. Wardlaw, District Judge, Presiding

Argued and Submitted June 10, 1999
Pasadena, California

Before: **KOZINSKI** and **FERNANDEZ**, Circuit Judges, and **SHUBB**,** District Judge.

Jeannie I. Johnson appeals her conviction and sentence after a jury found her guilty of twenty-nine counts of mail fraud, in violation of 18 U.S.C. § 1341. We reject each of Johnson's various arguments on appeal.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The Honorable William B. Shubb, Chief Judge of the United States District Court for the Eastern District of California, sitting by designation.

A. Language of the Indictment

Johnson argues (1) that the district court abused its discretion in denying her motion to strike "kickback" from the indictment, (2) that the indictment was impermissibly duplicitous, and (3) that the use of the word "kickback" violated her Fifth Amendment right not to be tried for a crime for which she was not indicted.

The court did not abuse its discretion. "Kickback" described the fraudulent scheme of payments that motivated the mailings, was relevant to the charge of mail fraud, and need not have been stricken. *See United States v. Terrigno*, 838 F.2d 371, 373 (9th Cir. 1988). Because the indictment can be read to charge only a single mail fraud scheme, it was not duplicitous. *See United States v. Bryan*, 868 F.2d 1032, 1037-38 (9th Cir.), *cert. denied*, 493 U.S. 858 (1989); *United States v. Gordon*, 844 F.2d 1397, 1400 (9th Cir. 1988). Use of the word "kickback" at trial did not go to prove a complex of facts any different from the mail fraud scheme charged in the indictment. *See United States v. Sarno*, 73 F.3d 1470, 1493 (9th Cir. 1995), *cert. denied sub nom Knapp v. United States*, 518 U.S. 1020 (1996); *United States v. Von Stoll*, 726 F.2d 584, 586 (9th Cir. 1984).

B. Exclusion of Evidence

Having made no offer of proof to show how evidence of Arlene Mose's billing practices would be relevant, Johnson cannot appeal its exclusion. *United States v. Pacheco*, 912 F.2d 297, 304 (9th Cir. 1990).

Johnson did not demonstrate how evidence of approval of the AC Transit billing arrangement, which

had no undisclosed payments, would be probative of her good faith. The testimony of Mr. Laffer did not make it so, when he did not testify concerning the making of undisclosed payments. The court acted within its discretion in finding that the evidence's probative value was outweighed by the confusion that introduction of the complex billing arrangement would cause.

Although Johnson argues that the court's exclusion of evidence pursuant to Federal Rule of Evidence 403 violated her constitutional right to present a defense, she has not demonstrated how the exclusion of non-probative evidence offends any fundamental principle of justice. *See Montana v. Egelhoff*, 518 U.S. 37, 43, 116 S.Ct. 2013, 2017, 135 L.Ed.2d 361 (1996).

C. Rule 11(e)(1)

The district court did not improperly engage in plea discussions in violation of Federal Rule of Criminal Procedure 11(e)(1). The transcript reflects that the court did not participate in plea discussions, but merely inquired whether the parties wished to pursue them in front of another judge. When it appeared that defense counsel might mention the defendant's position on entering a plea, the court interrupted and reiterated that any discussions would have to be in front of another judge.

D. Obstruction of Justice

Johnson also contends that the court failed to apply the United States Sentencing Guidelines ("U.S.S.G.") correctly when it found that she had obstructed justice. In

determining whether the defendant has perjured herself, the court evaluates her statements "in a light most favorable" to her. U.S.S.G. § 3C1.1 comment. (n. 1) (Nov. 1, 1995). The district court is not required by the "light most favorable" language to believe Johnson; rather, the court is merely instructed to resolve those conflicts about which the court has no firm conviction in the light most favorable to her. *United States v. Barbosa,* 906 F.2d 1366, 1370 (9th Cir.), *cert. denied,* 498 U.S. 961 (1990). The court was thus entitled to judge Johnson's credibility. The record supports the district court's four specific findings that Johnson willfully provided false and material testimony. Given the due regard we give to the district court's opportunity to judge the credibility of witnesses, we do not find that the court clearly erred when it determined that Johnson had obstructed justice.

E. Calculation of Loss

Finally, Johnson appeals from the calculation of loss made at sentencing. Where Johnson's testimony indicated that she understood it to be standard business practice for agencies to mark up the billing invoices of their contractors before submitting invoices to clients, the court did not abuse its discretion when it included the increased amount of the mark-up charged by ThirdWave caused by Johnson's conduct in the loss calculation as a reasonably foreseeable consequential loss pursuant to U.S.S.G. § 2F1.1.

AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CRIMINAL MINUTES – GENERAL

Case No. CR97-17-KMW Date 6-13-97

DOCKET ENTRY:

PRESENT: HON. KIM McLANE WARDLAW, JUDGE

M. Borgarding	N/A	Jeff Rawitz
Deputy Clerk	Court Reporter	Asst U.S. Attorney

U.S.A. v. (DEFENDANTS LISTED BELOW)

(1) JEANNIE L. JOHNSON
NOT present ____ custody X Bond ____ O/R

(2)
____ present ____ custody ____ bond ____ O/R

(3)
____ present ____ custody ____ bond ____ O/R

(4)
____ present ____ custody ____ bond ____ O/R

ATTORNEYS FOR DEFENDANTS

(1) STANLEY L. FRIEDMAN
NOT present ____ appointed X retained

(2) _____

_____ present _____ appointed _____ retained

(3) _____

_____ present _____ appointed _____ retained

(4) _____

_____ present _____ appointed _____ retained

PROCEEDINGS: IN CHAMBERS

The Court denies Defendant's Motion to Strike Surplusage from the Indictment pursuant to Fed.R.Crim.P. 7(d). The Court finds that the references in the Indictment to "Kickbacks" serve to explain the fraudulent scheme underlying Defendant's mail fraud charges, are legally relevant, and are not prejudicial. *United States v. Ramirez*, 710 F.2d 535 (9th Cir. 1983).

The motion to Strike is take off the 7-14-97 calendar.